Supreme Court, U.S.
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No. 95-749

In The

Supreme Court of the United States

October Term, 1995

SUSAN DAWSON KILCREASE,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The court of appeals determined that a new trial was required in this products liability case based on conflicting jury findings that the plaintiff was not causally negligent, but that she was 5% causally responsible for her injuries. Was this holding in error?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceeding below were the petitioner Susan Dawson Kilcrease and the respondent General Motors Corporation.

General Motors Corporation has no parent company. Its non-wholly-owned subsidiaries are as follows:

ACG Italia S.r.l.
ACGI S.p.A.
Asset Leasing GmbH
Aura Srl
Banque Opel
Beijing WY-GM Automotive Electronic Control Co., Ltd.
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG
Centro Tecnico Herramental, S.A. de C.V.
Diavia Aire, S.A.
Diavia S.r.l.
DRB s.a./n.v.
ENCI S.A.R.L.
Federal Computer Services Corp.
General Motors de Argentina S.A.
General Motors del Ecuador S.A.
General Motors GmbH & Co. OHG
General Motors-Holde's Automotive Limited
General Motors Colmotores, S.A.
GM Ovonic L.L.C.
GM-Saab Communication GmbH
Group Lotus, plc
Hughes-JVC Technology Corporation
IBC Vehicles Ltd.
IBC Vehicles (Distribution) Limited

LIST OF PARTIES AND RULE 29.6 LIST – Continued

Isuzu Motors Ltd.
Japan Systems Company Ltd.
Kabelwerke Reinshagen GmbH
Kabelwerke Reinshagen Werk Berlin GmbH
Kabelwerke Reinshagen Werk Neumarkt GmbH
Millbrook Pension Management Ltd.
New United Motor Manufacturing, Inc.
Opel-Automobilwerk Eisenach-PKW GmbH
OPEL Leasinggesellschaft mbH
Packard CTA Pty. Ltd.
Packard Electric Vas kft
PT General Motors Buana Indonesia
Saab Automobile AB
Subarban Limited Liability Company
Texton P.L.C.

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9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2510 (2d ed. 1995) 6

RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Motors Corporation respectfully requests that this Court deny the petition for writ of certiorari in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is tabulated at 66 F.3d 323 but is not reported. It is reprinted in the appendix to the petition at pages A-9 through A-11.

The rulings of the United States District Court for the Eastern District of Texas are not reported. They are reprinted in the appendix to the petition at pages A-4 through A-8.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. The petitioner's timely petition for rehearing was denied on September 8, 1995.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an appeal from a judgment on a jury verdict in favor of petitioner Susan Dawson Kilcrease ("Kilcrease")

against respondent General Motors Corporation ("General Motors") in a products liability case involving allegations of defective safety belt shoulder harnesses. The case arises out of a 1989 automobile accident in which Kilcrease's Chevrolet vehicle collided with a van which unexpectedly made a U-turn in front of her. (3 R. 299; 4 R. 652; 5 R. 14, 23, 51-52). Kilcrease (the driver) and her mother Beulah Dawson ("Dawson") (the front-seat passenger) were seriously injured in the collision.

Kilcrease and Dawson brought suit against General Motors on various crashworthiness theories, alleging design and warning defects in the vehicle's safety belt system. (3 R. 300; 4 R. 653-54; 6 R. 57-59, 62-69). It was the plaintiffs' theory that they were wearing their lap and shoulder safety belts, but that the shoulder harnesses failed to restrain them in the collision. It was General Motors' theory that the plaintiffs were not wearing their safety belts.

At trial, the jury exonerated General Motors as to the product defect claims and as to Dawson's claims, but found for Kilcrease on her failure to warn theory. (2 R. 230-31). In separate Rule 49(a) special findings, the jury found that Kilcrease was not causally negligent, (2 R. 232), but apportioned the causal responsibility for Kilcrease's injuries 25% to General Motors, 70% to the van driver, and 5% to Kilcrease herself, (2 R. 233). The trial court rendered judgment on the verdict, (2 R. 172-74), and denied General Motors' motion for new trial, (1 R. 10).

On General Motors' appeal, the court of appeals reversed and remanded for new trial, holding that the

jury's findings were irreconcilably inconsistent and that the trial court was without authority to choose between them in formulating its judgment. The court of appeals also rejected General Motors' challenge to the sufficiency of the evidence of causation, and found it unnecessary to address General Motors' contention that the surprise testimony of an expert witness should have been excluded.

REASONS FOR DENYING THE WRIT

The petitioner points to no conflict among the circuits which would justify the granting of a writ of certiorari in this case. Nor does she identify an issue of national importance which warrants this Court's attention. To the contrary, the legal principles applicable to this case are well-settled and undisputed; the petitioner challenges only the Court of Appeals' application of those principles to the facts of this particular case.

The Fifth Circuit is well aware of its Seventh Amendment-based duty to engage in a "concerted effort" to reconcile a jury's apparently conflicting findings in a special verdict case under Fed. R. Civ. P. 49(a). *See, e.g., Munn v. Algee*, 924 F.2d 568, 576 (5th Cir. 1991); *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040-41 (5th Cir. 1982); *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402, 406 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

The Fifth Circuit is also mindful, however, of its Seventh Amendment-based inability, and a corresponding inability on the part of the district courts, to choose between irreconcilably inconsistent jury findings in formulating a judgment. *See, e.g., FDIC v. Munn*, 804 F.2d

860, 866 (5th Cir. 1986); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 781 n.9 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987); *Brunner v. Maritime Overseas Corp.*, 779 F.2d 296, 297 (5th Cir.), *cert. denied*, 476 U.S. 1115 (1986); *Guidry v. Kem Manufacturing Co.*, 598 F.2d at 406.

The petitioner does not claim that the Fifth Circuit is ignorant of these principles, or that it has rejected them, or that it has found them inapplicable, or that it has engrafted onto them an improper exception or unwarranted gloss. Instead she claims only that the principles were not properly applied in the context of her specific case. This Court does not sit to review such microcosmic claims of error. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moreover, no error is presented. The court below correctly recognized the irreconcilable inconsistency between the jury's finding in this case that Kilcrease was not causally negligent and its finding that she was 5% comparatively responsible for her own injuries. The court appropriately found support in *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990), where a new trial was held to be required after the jury found the defendant not causally negligent but apportioned to the defendant 5% of the responsibility for one plaintiff's injuries and 10% of the responsibility for the other plaintiff's injuries.

The petitioner argues that the comparative responsibility question in this case did not require *negligent* causation, and that the answer to that question is therefore not inconsistent with the finding of non-negligence. Pet. at 6, 8. The court below properly declined to engage in such hair-splitting. *See Bahamas Agricultural Industries*

Ltd. v. Riley Stoker Corp., 526 F.2d 1174, 1182 (6th Cir. 1975), where the Sixth Circuit rejected a similar proffered distinction between a finding of no "causal negligence" on the part of the defendant and an apportionment of "negligence" to the defendant.

"[I]t is the duty of the courts to attempt to harmonize the answers, *if it is possible under a fair reading of them.*" *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963) (emphasis supplied). Here, under a "fair reading," the apportionment question must be taken as inquiring about negligent causation, just as the apportionment question in the *Bahamas Agricultural* case was taken as inquiring about causal negligence notwithstanding its nominal limitation to negligence.

The merits of this approach become more apparent when the focus is shifted from abstract semantics to the actual evidence in this case. There was no basis in the evidence for the jury to have found what the petitioner now posits that the jury found, namely that Kilcrease partially "caused" her own injuries in a non-negligent way. The evidence showed that another driver abruptly turned in front of Kilcrease's car; unless the jury believed that Kilcrease had failed to wear her safety belt (a belief negated by the finding of a causal warning defect), or that she was negligently travelling at an excessive rate of speed[1] or had otherwise negligently failed to avoid the

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[1] There was conflicting evidence regarding the speed of Kilcrease's vehicle at the time she began to brake. *Compare* 5 R. 25 (50-55 m.p.h.) *and* 6 R. 49-51 (52-58 m.p.h.) *with* 7 R. 13-14 (at least 65 m.p.h.) *and* 8 R. 26-27 (skid began at 60-64 m.p.h.).

collision, there was no basis for a finding that Kilcrease had caused her own injuries.

The petitioner's passing comment, in the nature of an afterthought, that "this Court should harmonize the procedures called for in preserving claimed error in jury verdicts under Subdivisions (a) and (b) of Rule 49, F.R.C.P.," Pet. at 9, presents no certworthy issue. This case was not argued or decided below on the basis of a conflict of decisions concerning preservation of error,[2] and preservation of error is not mentioned in the Questions Presented section of the petition.

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[2] Most, but not quite all, courts follow the error preservation rule articulated by the Fifth Circuit in this case, that no predischarge objection to the internal inconsistency of a Rule 49(a) special verdict is required as a predicate to complaint on appeal. *See* 5A J. Moore, *Moore's Federal Practice* ¶ 49.03[4], at 49-46 & n.17 (2d ed. 1995), and 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2510, at 215-26 & n.19 (2d ed. 1995), both collecting cases.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied in this case.

Respectfully submitted,

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